

Order

Michigan Supreme Court
Lansing, Michigan

March 23, 2016

Robert P. Young, Jr.,
Chief Justice

ADM File No. 2013-18

Stephen J. Markman

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Justices

Proposed Amendments of
Rules 2.004, 3.705, 3.708, 3.804,
3.904, 4.101, 4.201, 4.202, 4.304,
4.401, 5.119, 5.140, 5.402, 5.404,
5.738a, 6.006, and 6.901
of the Michigan Court Rules

On order of the Court, this is to advise that the Court is considering amendment of Rules 2.004, 3.705, 3.708, 3.804, 3.904, 4.101, 4.201, 4.202, 4.304, 4.401, 5.119, 5.140, 5.402, 5.404, 5.738a, 6.006, and 6.901 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at [Administrative Matters & Court Rules page](#).

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[Additions to the text are indicated in underlining and
deleted text is shown by strikeover.]

Rule 2.004 Incarcerated Parties

(A)-(B) [Unchanged.]

(C) When all the requirements of subrule (B) have been accomplished to the court's satisfaction, the court shall issue an order requesting the department, or the facility where the party is located if it is not a department facility, to allow that party to participate with the court or its designee by way of a noncollect and unmonitored telephone call or by ~~video conference~~ videoconferencing technology in a ~~hearing or conference as described in subrule (E), including a friend of the court adjudicative hearing or meeting.~~ hearingconference. The order shall include the date and time for the hearingconference, and the prisoner's name and prison identification number, and shall be served at least 7 days before the conference by the court upon the parties and the warden or supervisor of the facility where the incarcerated party resides.

- (D) [Unchanged.]
- (E) The purpose of the ~~telephone call or video conference~~ incarcerated party's participation as described in ~~this subrule~~ (C) is to determine
- (1) whether the incarcerated party has received adequate notice of the proceedings and has had an opportunity to respond and to participate,
 - (2) whether counsel is necessary in matters allowing for the appointment of counsel to assure that the incarcerated party's access to the court is protected,
 - (3) whether the incarcerated party is capable of self-representation, if that is the party's choice,
 - (4) how the incarcerated party can communicate with the court or the friend of the court during the pendency of the action, and whether the party needs special assistance for such communication, including participation ~~in~~ by way of additional telephone calls or ~~video conferences~~ videoconferencing technology as permitted by the Michigan Court Rules, and
 - (5) the scheduling and nature of future proceedings, to the extent practicable, and the manner in which the incarcerated party may participate.

(F)-(G)[Unchanged.]

Rule 3.705 Issuance of Personal Protection Orders

- (A) [Unchanged.]
- (B) Hearings.
- (1)-(2)[Unchanged.]
 - (3) The hearing shall be held on the record. In accordance with MCR 2.407, the court may allow the use of videoconferencing technology by any participant as defined in MCR 2.407(A)(1).
 - (4)-(6)[Unchanged.]
- (C) [Unchanged.]

Rule 3.708 Contempt Proceedings for Violation of Personal Protection Orders

(A)-(C)[Unchanged.]

(D) Appearance or Arraignment; Advice to Respondent. At the respondent's first appearance before the circuit court, whether for arraignment under MCL 764.15b, enforcement under MCL 600.2950, 600.2950a, or 600.1701, or otherwise, the court must:

(1)-(6) [Unchanged.]

(7) As long as the respondent is either present in the courtroom or has waived the right to be present, on motion of either party, the court may use telephonic, voice, or videoconferencing technology to take testimony from an expert witness or, upon a showing of good cause, any person at another location.

(E)-(G)[Unchanged.]

(H) The Violation Hearing.

(1) Jury. There is no right to a jury trial.

(2) Conduct of the Hearing. The respondent has the right to be present at the hearing, to present evidence, and to examine and cross-examine witnesses. As long as the respondent is either present in the courtroom or has waived the right to be present, on motion of either party, and with the consent of the parties, the court may use telephonic, voice, or videoconferencing technology to take testimony from an expert witness or, upon a showing of good cause, any person at another location. A party who does not consent to the use of videoconferencing technology to take testimony from a person at the hearing shall not be required to articulate any reason for not consenting.

(3)-(5)[Unchanged.]

In addition to such a sentence, the court may impose other conditions to the personal protection order.

(I) Mechanics of Use. The use of videoconferencing technology under this rule must be in accordance with the standards established by the State Court Administrative Office. All proceedings at which videoconferencing technology is used must be recorded verbatim by the court.

Rule 3.804 Consent and Release

(A) [Unchanged.]

(B) Hearing.

- (1) The consent hearing required by MCL 710.44(1) must be promptly scheduled by the court after the court examines and approves the report of the investigation or foster family study filed pursuant to MCL 710.46. If an interested party has requested a consent hearing, the hearing shall be held within 7 days of the filing of the report or foster family study.
- (2) A consent hearing involving an Indian child pursuant to MCL 712B.13 must be held in conjunction with either a consent to adopt, as required by MCL 710.44, or a release, as required by MCL 710.29. Notice of the hearing must be sent to the parties prescribed in MCR 3.800(B) in compliance with MCR 3.802(A)(3).
- (3) The court may not use videoconferencing technology for the consent and release hearings required to be held pursuant to the adoption code and this subrule.

(C) [Unchanged.]

Rule 3.904 Use of ~~Interactive Video~~ Videoconferencing Technology

(A) ~~Facilities. Courts may use two-way interactive video technology to conduct the proceedings outlined in subrule (B).~~

(B) ~~Hearings.~~

- (1) ~~Delinquency Proceedings. Two-way interactive video technology may be used to conduct preliminary hearings under MCR 3.935(A)(1), postdispositional progress reviews, and dispositional hearings where the court does not order a more restrictive placement or more restrictive treatment.~~
- (2) ~~Child Protective Proceedings. Two-way interactive video technology may be used to conduct preliminary hearings or review hearings.~~

(A) Delinquency, Designated, and Personal Protection Violation Proceedings. Courts may use videoconferencing technology in delinquency, designated, and personal protection violation proceedings as follows.

(1) Juvenile in the Courtroom or at a Separate Location. Videoconferencing technology may be used between a courtroom and a facility when conducting preliminary hearings under MCR 3.935(A)(1), preliminary examinations under MCR 3.953 and MCR 3.985, postdispositional progress reviews, and dispositional hearings where the court does not order a more restrictive placement or more restrictive treatment.

Alternative A	Alternative B
<p>(2) <u>Juvenile in the Courtroom-Other Proceedings. As long as the juvenile is either present in the courtroom or has waived the right to be present, on motion of either party showing good cause, the court may use videoconferencing technology to take testimony from an expert witness or a person at another location in any delinquency, designated, or personal protection violation proceeding under this subchapter, except that parties must consent if the proceeding is a trial. A party who does not consent to the use of videoconferencing technology to take testimony from a person at trial shall not be required to articulate any reason for not consenting.</u></p>	<p>(2) <u>Juvenile in the Courtroom-Other Proceedings. Except as otherwise provided in this rule, as long as the juvenile is either present in the courtroom or has waived the right to be present, on motion of either party showing good cause, the court may use videoconferencing technology to take testimony from an expert witness or a person at another location in any delinquency, designated, or personal protection violation proceeding under this subchapter. If the proceeding is a trial, only the consent of the juvenile is required. If the petitioner objects to the use of two-way interactive video technology at trial, the court must determine whether to use the video technology by balancing the following factors:</u></p> <p>(a) <u>Whether any undue prejudice or infringement on physical liberty or other fundamental interest, particularly the defendant's right to a fair opportunity to defend against the state's accusations, would result.</u></p> <p>(b) <u>Whether the procedure would allow for full and effective cross-examination, especially when the cross-examination</u></p>

	<p><u>would involve documents or other exhibits.</u></p> <p><u>(c) The convenience of the parties and the proposed witness, and the cost of producing the witness in person in relation to the importance of the offered testimony.</u></p> <p><u>(d) Whether the dignity, solemnity, and decorum of the courtroom would tend to impress upon the witness the duty to testify truthfully.</u></p> <p><u>(e) Whether the person appearing by videoconferencing technology presents a significant security risk to transport and be present physically in the courtroom.</u></p> <p><u>(f) Whether the court is satisfied that it can sufficiently control the proceedings at the remote location so as to effectively extend the courtroom to the remote location.</u></p>
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(B) Child Protective and Juvenile Guardianship Proceedings.

- (1) Except as provided in subrule (B)(2), courts may allow the use of videoconferencing technology by any participant, as defined in MCR 2.407(A)(1), in any proceeding.
- (2) As long as the respondent is either present in the courtroom or has waived the right to be present, on motion of either party showing good cause, the court may use videoconferencing technology to take testimony from an expert witness or any person at another location in the following proceedings:
- (a) removal hearings under MCR 3.967, evidentiary hearings, and termination of parental rights proceedings under MCR 3.977;

<u>Alternative A</u>	<u>Alternative B</u>
<u>(b) with the consent of the parties, trials. A party who does not consent to the use of videoconferencing technology to take</u>	<u>(b) trials, with the respondent's consent, except as otherwise provided by law. If the petitioner objects to the use of two-way</u>

<p><u>testimony from a person at trial shall not be required to articulate any reason for not consenting.</u></p>	<p><u>interactive video technology at trial, the court must determine whether to use the video technology by balancing the following factors:</u></p> <p><u>(a) Whether any undue prejudice or infringement on physical liberty or other fundamental interest, particularly the defendant's right to a fair opportunity to defend against the state's accusations, would result.</u></p> <p><u>(b) Whether the procedure would allow for full and effective cross-examination, especially when the cross-examination would involve documents or other exhibits.</u></p> <p><u>(c) The convenience of the parties and the proposed witness, and the cost of producing the witness in person in relation to the importance of the offered testimony.</u></p> <p><u>(d) Whether the dignity, solemnity, and decorum of the courtroom would tend to impress upon the witness the duty to testify truthfully.</u></p> <p><u>(e) Whether the person appearing by videoconferencing technology presents a significant security risk to transport and be present physically in the courtroom.</u></p> <p><u>(f) Whether the court is satisfied that it can sufficiently control the proceedings at the remote location so as to effectively extend the courtroom to the remote location.</u></p>
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[Note: For a description of the different approaches expressed by the two alternatives above, please see the note following MCR 6.006 in this order. Because both alternatives in MCR 3.904 represent proposed new language in this rule, the alternatives are underlined, but there is no strikethrough like the side-by-side comparison of the proposed alternatives of MCR 6.006(C)(2).]

- (C) Mechanics of Use. The use of ~~two-way interactive video~~videoconferencing technology under this rule must be ~~conducted~~ in accordance with ~~any requirements and guidelines~~the standards established by the State Court Administrative Office. All proceedings at which ~~such~~ videoconferencing technology is used must be recorded verbatim by the court.

Rule 4.101 Civil Infraction Actions

(A)-(E)[Unchanged.]

(F) Contested Actions; Notice; Defaults.

(1)-(4)[Unchanged.]

(5) For any hearing held under this subchapter, in accordance with MCR 2.407, the court may allow the use of videoconferencing technology by any participant as defined in MCR 2.407(A)(1).

(G)-(H)[Unchanged.]

Rule 4.201 Summary Proceedings to Recover Possession of Premises

(A)-(E)[Unchanged.]

(F) Appearance and Answer; Default.

(1)-(4)[Unchanged.]

(5) Use of Videoconferencing Technology. For any hearing held under this subchapter, in accordance with MCR 2.407, the court may allow the use of videoconferencing technology by any participant as defined in MCR 2.407(A)(1).

(G)-(O)[Unchanged.]

Rule 4.202 Summary Proceedings; Land Contract Forfeiture

(A)-(G)[Unchanged.]

(H) Answer; Default.

(1)-(2) [Unchanged.]

- (3) Use of Videoconferencing Technology. For any hearing held under this subchapter, in accordance with MCR 2.407, the court may allow the use of videoconferencing technology by any participant as defined in MCR 2.407(A)(1).

(I)-(L) [Unchanged.]

Rule 4.304 Conduct of Trial

- (A) Appearance. If the parties appear, the court shall hear the claim as provided in MCL 600.8411. In accordance with MCR 2.407, the court may allow the use of videoconferencing technology by any participant as defined in MCR 2.407(A)(1). The trial may be adjourned to a later date for good cause.

(B) [Unchanged.]

Rule 4.401 District Court Magistrates

- (A) Procedure. Proceedings involving district court magistrates must be in accordance with relevant statutes and rules.
- (B) Duties. Notwithstanding statutory provisions to the contrary, district court magistrates exercise only those duties expressly authorized by the chief judge of the district or division.
- (C) Control of Magisterial Action. An action taken by a district court magistrate may be superseded, without formal appeal, by order of a district judge in the district in which the magistrate serves.
- (D) Appeals. Appeals of right may be taken from a decision of the district court magistrate to the district court in the district in which the magistrate serves by filing a written claim of appeal in substantially the form provided by MCR 7.104 within 7 days of the entry of the decision of the magistrate. No fee is required on the filing of the appeal, except as otherwise provided by statute or court rule. The action is heard de novo by the district court.
- (E) A district court magistrate may use videoconferencing technology in accordance with MCR 2.407 and MCR 6.006.

Rule 5.119 Additional Petitions; Objections; Hearing Practices

(A)-(D)[Unchanged.]

(E) Use of Videoconferencing Technology.

- (1) Hearing on Objection. For a hearing on an objection, on motion of any interested person and upon a showing of good cause, the court may use videoconferencing technology to take testimony by any person unless the subject of the initial petition does not consent to the use of videoconferencing technology.
- (2) Hearing on Conduct of Fiduciary. If a hearing is scheduled to determine whether a fiduciary is properly performing his or her duties, on motion of any interested person and upon a showing of good cause, the court may use videoconferencing technology to take testimony by any person unless the subject of the initial petition does not consent to the use of videoconferencing technology.

Rule 5.140 Use of Videoconferencing Technology

- (A) Except as otherwise prescribed by MCR 5.119, MCR 5.402(F), MCR 5.404(B), or MCR 5.738a, for any hearing held under this chapter, in accordance with MCR 2.407, the court may allow the use of videoconferencing technology by any participant as defined in MCR 2.407(A)(1).
- (B) Mechanics of Use. The use of videoconferencing technology under this chapter must be in accordance with the standards established by the State Court Administrative Office. All proceedings at which videoconferencing technology is used must be recorded verbatim by the court.

Rule 5.402 Common Provisions

(A)-(E)[Unchanged.]

- (F) Use of Videoconferencing Technology. Except as prohibited by MCR 5.404(B)(1), the courts may use videoconferencing technology to conduct any hearing in a guardianship proceeding unless the subject of the initial petition does not consent to the use of videoconferencing technology.

Rule 5.404 Guardianship of Minor

- (A) [Unchanged.]
- (B) Voluntary Consent to Guardianship of an Indian Child.

A voluntary consent to guardianship of an Indian child must be executed by both parents or the Indian custodian.

- (1) Form of Consent. To be valid, the consent must contain the information prescribed by MCL 712B.13(2) and be executed on a form approved by the State Court Administrative Office, in writing, recorded before a judge of a court of competent jurisdiction, and accompanied by the presiding judge's certificate that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent or Indian custodian. The court shall also certify that either the parent or Indian custodian fully understood the explanation in English or that it was interpreted into a language that the parent or Indian custodian understood. Any consent given before, or within 10 days after, the birth of the Indian child is not valid. The court may not use videoconferencing technology for the consent hearing required to be held pursuant to the Michigan Indian Family Preservation Act and this subrule.

(2)-(3)[Unchanged.]

(C)-(H)[Unchanged.]

Rule 5.738a Use of ~~Interactive Video~~ Videoconferencing Technology

- (A) ~~Probate courts may use two-way interactive video technology to conduct the proceedings outlined in subrule (B).~~
- (B) Hearings. ~~Probate~~The courts may use two-way interactive videovideoconferencing technology to conduct any ~~hearings concerning initial involuntary treatment, continuing mental health treatment, and petitions for guardianship involving persons receiving treatment in mental health facilities. in a mental health proceeding under any of the following conditions:~~
 - (1) The subject of the petition does not object to the use of videoconferencing technology.
 - (2) The court excludes the subject from a hearing if the subject's behavior at the hearing would make it impossible to conduct the hearing. The court shall enter on the record its reasons for excluding the subject of a petition from the hearing.
 - (3) The subject's presence is waived by the court if there is testimony by a physician or licensed psychologist who has recently observed the subject

that the subject's attendance would expose the subject to serious risk of physical harm.

- (C) ~~Mechanics of Use. The use of two-way interactive video technology must be conducted in accordance with any requirements and guidelines established by the State Court Administrative Office. All proceedings at which such technology is used must be recorded verbatim by the court.~~

Rule 6.006 Video and Audio Proceedings

(A)-(B)[Unchanged.]

- (C) Defendant in the Courtroom - Other Proceedings. As long as the defendant is either present in the courtroom or has waived the right to be present, upon a showing of good cause, district and circuit courts may use two-way interactive video technology to take testimony from a person at another location in the following proceedings:

- (1) evidentiary hearings, competency hearings, sentencings, probation revocation proceedings, and proceedings to revoke a sentence that does not entail an adjudication of guilt, such as youthful trainee status;

Alternative proposals for MCR 6.006(C)(2)

Alternative A (current language unchanged)	Alternative Proposal B (with proposed changes shown)
(2) with the consent of the parties, trials. A party who does not consent to the use of two-way interactive video technology to take testimony from a person at trial shall not be required to articulate any reason for not consenting.	(2) <u>trial, with the defendant's consent of the parties, trials, except as otherwise provided by law.</u> A party who does not consent to the use of two-way interactive video technology to take testimony from a person at trial shall not be required to articulate any reason for not consenting. <u>If the prosecution objects to the use of two-way interactive video technology at trial, the court must determine whether to use the video technology by balancing the following factors:</u> (a) Whether any undue prejudice or

	<p><u>infringement on physical liberty or other fundamental interest, particularly the defendant's right to a fair opportunity to defend against the state's accusations, would result.</u></p> <p><u>(b) Whether the procedure would allow for full and effective cross-examination, especially when the cross-examination would involve documents or other exhibits.</u></p> <p><u>(c) The convenience of the parties and the proposed witness, and the cost of producing the witness in person in relation to the importance of the offered testimony.</u></p> <p><u>(d) Whether the dignity, solemnity, and decorum of the courtroom would tend to impress upon the witness the duty to testify truthfully.</u></p> <p><u>(e) Whether the person appearing by videoconferencing technology presents a significant security risk to transport and be present physically in the courtroom.</u></p> <p><u>(f) Whether the court is satisfied that it can sufficiently control the proceedings at the remote location so as to effectively extend the courtroom to the remote location.</u></p>
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[Note: The Court is considering alternative formulations of this provision. One alternative would maintain the current requirement that both parties at trial must consent to the use of videoconference equipment to take testimony from a person at another location. The other alternative would require only the defendant's consent; if the prosecutor objects, the court would make a decision on the basis of factors taken from MCR 2.407, which governs the use of videoconference equipment in civil proceedings. The alternatives are presented here in a side-by-side format to make clear the alternative

positions expressed. Similar alternatives are provided in this order at MCR 3.904(A) and (B) regarding juvenile delinquency and child protective proceedings.]

- (D) Defendant at a Separate Location – Felony Sentencing. As long as the defendant has waived the right to be present in the courtroom and agrees to participate in the proceeding via two-way interactive video technology, circuit courts may use videoconferencing equipment between a courtroom and a prison, jail, or other location to conduct sentencings for felony offenses.

~~(D)~~(E) [Relettered, but otherwise unchanged.]

Rule 6.901 Applicability

(A)-(B)[Unchanged.]

- (C) Video and Audio Proceedings. The courts may use telephonic, voice, or videoconferencing technology under this subchapter as prescribed by MCR 6.006.

Staff comment: The proposed amendments of MCR 2.004, 3.705, 3.708, 3.804, 3.904, 4.101, 4.201, 4.202, 4.304, 4.401, 5.119, 5.140, 5.402, 5.404, 5.738a, 6.006, and 6.901 would permit courts to expand the use of videoconferencing technology in many court proceedings.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Supreme Court Clerk in writing or electronically by July 1, 2016, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2013-18. Your comments and the comments of others will be posted under the chapter affected by this proposal at [Proposed & Recently Adopted Orders on Admin Matters page](#).



I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

March 23, 2016


Clerk